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IN THE

Supreme Court of the United States

October Term, 1982

NUNZIO PROVENZANO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

Whether the trial court committed reversible error in (1) not dismissing the indictment or remanding for a hearing on the ground that there were less than twelve of the grand jurors who signed the indictment present at all times when evidence was being presented to the grand jury and (2) in denying petitioner's motion for disclosure of the transcripts of proceedings before the indicting grand jury when it was conceded that only a fraction of the evidence presented to an earlier grand jury was presented to the indicting grand jury?

List of Parties

Apart from the party named in the caption to this Petition the other parties involved in the case were Irving Cotler, who was also convicted, and Salvatore Provenzano and Michael Sciarra who were acquitted.

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The petitioner Nunzio Provenzano respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, affirming the judgment of conviction entered against the petitioner by the United States District Court for the District of New Jersey.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at pp. 1a-19a. No opinion was rendered by the District Court for the District of New Jersey, but the Court stated the reasons for some of its rulings in a letter to counsel which appears in the Appendix at pp. 22a-25a.

Jurisdiction

The date of the judgment of the United States Court of Appeals for the Third Circuit was September 1, 1982, which was also the date of entry. The petitioner filed a timely petition for rehearing, which was denied on September 27, 1982. App. p. 20a-21a. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

Constitutional and Statutory Provisions Involved in the Case

The United States Constitution, Amendment V (in pertinent part):

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .

Federal Rules of Criminal Procedure, Rule 6(e)(3)(C) (in pertinent part):

> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made. . . . (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

Statement of the Case

The petitioner and three others were charged with violations of 18 U.S.C. § 1962(c) (RICO) as well as con-

spiracy. Three of the defendants, including the petitioner, were officials of the Teamsters Local 560. The fourth defendant was Irving Cotler, an owner of trucking companies. The essence of the government's allegations was that over a period of some years the defendant had employed Cotler as a conduit to receive bribes from trucking companies in return for the petitioner's arranging to relax certain onerous rules of the national agreement between the union and the truckers. The evidence heavily implicated Cotler in such dealings but contained very little to connect the petitioner with the arrangements. Rejecting arguments of insufficiency of evidence and motions for a judgment of acquittal, the trial court let the case go to the jury, who acquitted the other two union defendants but convicted the petitioner and Cotler.

In his appeal to the Circuit Court, the petitioner raised a number of points including the insufficiency of the evidence to establish the elements of the RICO offense, the impropriety of denying petitioner's motion for severance from Cotler and questions regarding the validity of the procedures before the grand jury. This Petition pursues the issues that raise questions of the trial court's denying the petitioner a fair opportunity to press his allegations of improprieties in connection with the return of the indictment of the grand jury.

The indictment was returned on September 4, 1980, by a grand jury that was empanelled on October 18, 1979. However, a previous grand jury, empanelled on April 13, 1978, also heard evidence in the matter. This previous grand jury was a special one and its initial 18 month term was due to expire on October 13, 1979. On October 9, 1979, the district court granted the government's motion to extend the term for six months and two more such extensions might have been applied for under 18 U.S.C. § 3333(e). Thus the two grand juries overlapped for several months. With this background, the defendants moved under Rule 6(e)(3)(c)(ii) of the Federal Rules of Criminal Procedure for disclosure of the proceedings before the indicting grand jury in order to

ascertain whether this grand jury had improperly relied on summaries of proceedings before the first grand jury.

The government responded to the defendants' motion papers with an affidavit from Thomas L. Weisenbeck, a special attorney for the United States. (26a-28a) This affidavit averred that the first grand jury heard testimony from 19 individuals and also received documents. The second (indicting) grand jury heard testimony from 51 individuals. but of the 19 witnesses who appeared before the first grand jury only 3 witnesses were called to repeat their testimony before the indicting grand jury. The testimony of the other 16 witnesses who had appeared before the first grand jury was not presented to the indicting jury because the government did not judge their testimony to be "significant enough". However, the indicting grand jury "was given the opportunity to review all testimony and documents received by the April 13, 1978 Grand Jury". (Weisenbeck affidavit, 26a-28a) The trial court accepted that no summaries had been read to the second grand jury. The Court of Appeals, while reiterating the concern — expressed in earlier cases — they had "with the practice of having a number of grand juries hear testimony which the indicting grand jury ultimately uses as a basis for indictment", concluded that the district court had in this case not erred in refusing the defendant's request for disclosure of the grand jury transcripts. (12a)

A second issue supported the petitioner's request for inspection of the grand jury records. He alleged that all of the grand jurors who voted for the indictment were not present at the sessions of the grand jury. As the Court of Appeals summarized the matter:

> The district judge examined the voting tallies and attendance records *in camera* and found that out of the twelve votes necessary under Fed. R. Crim. P. 6(f) three of the voting jurors attended every session, four missed one session each, three were absent from two sessions each, and two jurors were not present three sessions each. (13a)

While confessing that the justifications for such a practice left them "somewhat uneasy" (15a) and that the practice itself in this case "may border the limits of acceptability" (16a) the Court of Appeals refused to remand or reverse.

Reasons For Granting the Writ

Successive Grand Juries

A defendant enjoys a constitutional right to indictment by a grand jury under the Fifth Amendment, a right to the equal protection of the laws and a right that the Federal Rules of Criminal Procedure be observed. The propriety of the grand jury procedures is an especially important requirement when, as in the present case, no preliminary hearing was held and the indictment constitutes the only screening procedure to protect the defendant from unwarranted charges.

Since the grand jury is essentially controlled by the prosecutor and is a peculiar institution in that it is the only truly inquisitional organ in our criminal justice system, there is an especially sensitive need that no appearance be created of manipulation of the jury by the government. For this reason, courts have been sharply insistent that a successor grand jury cannot properly rely on summaries of testimony that were presented to its predecessor.

The right to indictment by an unbiased grand jury is clearly stated in *Costello v. United States*, 350 U.S. 359 (1956). The use of summaries has many times been condemned as improper and it has been said that a defendant need not always show prejudice to be entitled to a dismissal. *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979). The practice of reading summaries of testimony to a grand jury taken from testimony to a prior jury was roundly condemned in *In Re Grand Jury Investigation of the Banana Industry*, 214 F. Supp. 856, 859 (D. Md. 1963), where the court said:

> But convenience is not the only consideration. Fairness to the persons whose conduct is being investigated must also be considered. The court should foreclose any possibility that even an inadvertently unfair summary of the testimony taken before the Grand Jury in Maryland might be presented to the Grand Jury in California.

The Court of Appeals accepted the finding of the trial court that in this case no "summaries" were presented to the indicting jury. (12a) But the suggested distinction is surely without significance. Why should it be more objectionable to present a grand jury with an edited version of what one witness said than to present them with an edited version of the overall proceedings before the predecessor jury?

The government may not have a general obligation to present all possibly exculpatory evidence to a grand jury, but that is hardly the point at issue. The question is whether the government by shifting its presentation from one grand jury to another can effectively erase testimony already presented. This is what is achieved by "summarizing" and this too is what is achieved by the practice in the present case of picking out pieces of the earlier record. Selectivity as to witnesses seems hardly more defensible than selectivity as to the portions of the testimony of one witness. It is true that the government affidavit contends that the indicting grand jury was "given the opportunity to review all testimony" but this is a cryptic and unsatisfying explanation. There is a great difference between fully presenting something and, on the other hand, merely informing people that it exists and that they may look at it if they care to take the trouble. The government need never have presented certain witnesses to a grand jury in the first place, but the question now is whether, having made the presentation, they can effectively erase the testimony by manipulating the sequence of grand juries.

In the present case the defendant surely made a sufficient initial showing to raise the possibility that

prejudice might have been inflicted or an unacceptable procedure followed either through impropriety or through negligence. The Court of Appeals' response to this argument - that the calling of a large number of witnesses before the indicting grand jury demonstrated that the government was not being selective - seems quite unconvincing. It is not the number of witnesses who were called before the indicting grand jury that is relevant at all but rather the ones who were called before the first grand jury and then *not* called before the second one.

The considerable dangers of not acceding to a defendant's motion for inspection of the grand jury minutes are revealed in the opinion of the Court of Appeals for the Second Circuit in *United States v. Jacobson*, ____ F.2d ____, Docket No. 82-1083 (2nd Cir. October 12, 1982). In that case, there were issues on appeal concerning the propriety of indicting the defendant on the basis solely of reading to the indicting grand jury transcripts of earlier testimony before another grand jury. Only by chance, through questions that the judges on the Second Circuit panel happened to put to the United States Attorney at oral argument, did it become apparent that there were "serious inconsistencies between the government's brief and the actual record before the grand jury". (Slip. Op. at 5305) Because of the trial court's denial of defendant's motion to inspect the minutes, "appellant's counsel has not reviewed the grand jury transcripts and thus has not had an opportunity to argue from an accurate factual base." (*Id.* at 5306) Accordingly, the court remanded the case for a hearing "as to whether the indictment is valid" and ordered that "all relevant transcripts of all grand juries be given to appellant". (*Id.* at 5306-5307).

Jacobson shows the dangers of excessive reliance on government affidavits and briefs. When the defendant has made a colorable case that the grand jury may not have indicted on a proper basis he ought to be afforded the opportunity to follow up that possibility.

The Grand Jury Voting

This issue was characterized by the Court of Appeals as the "more difficult" one. (13a) The district court had relied on the split panel decision in *United States v. Leverage Funding Systems Inc.*, 637 F.2d 645 (9th Cir. 1980), *cert. denied* 452 U.S. 961, (1981), to the effect that neither constitutional doctrine nor the Federal Rules of Criminal Procedure require a per se dismissal in a case where less than twelve of the jurors who voted for indictment were present at all sessions of the grand jury where evidence was presented. The Court of Appeals in the instant case, while "uneasy", accepted the justifications offered in *Leverage Funding*, though it expressed the opinion that it would have been better to follow a practice, neglected in this case, of furnishing transcripts to grand jurors of the portions of the proceedings which they had missed. (16a)

It submitted that the Court of Appeals was quite right to feel uneasy and to take the view that the best practice was neglected in this case but it was wrong not to remand for further proceedings. The constitutional requirement of a grand jury indictment is rendered meaningless if, in a case like this — conceded by the court to be at the very margin of propriety — the defendant is deprived of the opportunity to make his own inspection and mount his own arguments based on this opportunity. In *United States v. Camiel*, 503 F. Supp. 769, 722 (E.D. Pa. 1981), where the defendant's complaint was much the same as in the instant case, the court granted a motion to disclose, stating that if the grand jury transcripts indicated that some jurors had missed significant portions of the testimony and if this would reduce the number who had heard such testimony below twelve, the court would reconsider defendant's motion to dismiss.

In a system where preliminary hearings are routinely bypassed by indictments, the grand jury is the only body that stands between the citizen and arbitrary prosecution. Every decision that erodes serious enforce-

ment of the rules and principles designed to enable the grand jury to fulfill this function diminishes the protection against capricious accusation. This case presents this Court with the opportunity to strengthen the shield that the grand jury is historically destined to interpose between the citizen and government.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted

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Date: November 1, 1982